Supreme Court, U.S.
FILED

95-835 NOV 27 1995

No. ____ OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1995

JUAN DELGADO AND JUAN CARLOS RIVEROL,

Petitioners,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals, Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

Counsel For Petitioners

ARTHUR JOEL BERGER
Counsel of Record
Suite 506
9200 South Dadeland Blvd.
Miami, Florida 33156
Phone: (305) 670-0067

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

62 pp

QUESTIONS PRESENTED

1. Is it impermissible in a drug prosecution to argue to the jury that it should consider the "war on drugs" when resolving the issue of a defendant's guilt or innocence?

2. Can a defendant be convicted of aiding and abetting the importation of cocaine into the United States, based on the fact that civilian government informants flew the cocaine from the country of Colombia into Guantanamo Naval Base, Cuba?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

OPINION BELOW 1

BASIS FOR JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE PETITION 12

CONCLUSION 23

APPENDIX

Opinion Of The Lower Appellate Court .....App. 1

Order Denying Rehearing .....App. 32

TABLE OF AUTHORITIES

Page

CASES

Blackmer v. United States, 234 U.S. 421 (1932) 18

Corcoran v. United States, 427 F.2d 16 (9th Cir. 1970) 16

Crandon v. United States, 494 U.S. 152 (1990)..... 22

Cuban American Bar Assoc., Inc. v. Christopher, 43 F.3d 1412 (11th Cir. 1995)..... 20

E.E.O.C. v. Arabian American Oil Co., 499 U.S. 244 (1991) 21

Haynes v. United States, 319 F.2d 620 (5th Cir. 1963) 16

Hendrix v. United States, 327 F.2d 971 (5th Cir. 1964)..... 17

Jordan v. United States, 428 F.2d 7 (9th Cir. 1970) 16

Juvera v. United States, 378 F.2d 433 (9th Cir. 1967) 16

McClain v. United States, 417 F.2d 419 (9th Cir. 1969)..... 16

O'Callahan v. Parker, 395 U.S. 258 (1969)..... 21

Pearcy v. Stanahan, 205 U.S. 257 (1907) 19

Pederson v. United States, 392 F.2d 41 (9th Cir. 1968) 16

Shuttlesworth v. City of Birmingham, 373 U.S. 262 (1963) 17

Skirotes v. Florida, 313 U.S. 69 (1941) 18, 19

Standefer v. United States, 447 U.S. 10 (1980)..... 17

United States v. Beasley, 2 F.3d 1551 (11th Cir. 1993) 13

United States v. Bowman, 260 U.S. 94 (1922)..... 21

United States v. Brown, 887 F.2d 537 (1989) 13

TABLE OF AUTHORITIES – Continued

Page

United States v. Delgado, 56 F.3d 1357 (11th Cir. 1995) 13

United States v. Ferguson, 935 F.2d 1518 (7th Cir. 1991) 13

United States v. Gould, 419 F.2d 825 (9th Cir. 1969) 16

United States v. Johnson, 968 F.2d 768 (8th Cir. 1992) 13

United States v. Meinster, 619 F.2d 1041 (4th Cir. 1980) 16

United States v. Miller, 471 U.S. 130 (1985) 17

United States v. Moreno, 878 F.2d 817 (5th Cir. 1989) 16

United States v. Perez, 776 F.2d 797 (9th Cir. 1985) 20

United States v. Solivan, 937 F.2d 1146 (6th Cir. 1991) 14

United States v. Zielie, 734 F.2d 1447 (11th Cir. 1984) 13

Vermilya-Brown, Co. v. Connell, 335 U.S. 377 (1948) 19

Viereck v. United States, 318 U.S. 236 (1943) 13

OTHER AUTHORITIES

19 U.S.C. § 1502 (Harmonized Tarriff Schedule n.2) 17

21 U.S.C. § 802(28) 18

21 U.S.C. § 885(d) 16

21 U.S.C. § 951(b) 18

21 U.S.C. § 952(a) 2, 15, 16, 17

TABLE OF AUTHORITIES – Continued

Page

48 U.S.C. §§ 1681, 1694 20

48 Stat. 1682 19

House Report No. 91-1444 20

Pub. L. No. 91-513 § 102 ..... 18, 20

The petitioners, Juan Delgado and Juan Carlos Riverol, jointly petition this Court to review the judgment and opinion of the United States Court of Appeals, Eleventh Circuit in this case.

OPINION BELOW

The opinion of the lower appellate court is contained in the appendix to this petition and also is reported at 56 F.3d 1357.

BASIS FOR JURISDICTION

The opinion of the lower appellate court was filed on July 5, 1995. The lower appellate court entered an order denying a joint petition for rehearing on August 30, 1995.

This Court has jurisdiction to review a decision of a United States Court of Appeals pursuant to 28 United States Code Section 1254.

STATUTORY PROVISIONS INVOLVED

18 United States Code Section 2(a) provides:

> Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

21 United States Code Section 952 (a) provides in pertinent part:

> It shall be unlawful to import into the customs territory of the United States from any place outside thereof (but within the United States), or to import into the United States from any place outside thereof, any controlled substance. . . .

STATEMENT OF THE CASE

This is a federal criminal case involving prosecution for violations of federal criminal drug statutes. The United States District Court for the Southern District of Florida acquired subject matter jurisdiction pursuant to 18 United States Code Section 3231. Following their convictions, petitioners Delgado and Riverol took direct appeals to the United States Court of Appeals for the Eleventh Circuit, utilizing 28 United States Code Section 1291 as the basis for appellate court jurisdiction.

1. Testimony From Law Enforcement Agents.

David Cavanaugh was a civilian pilot, who worked undercover for and was paid by the Drug Enforcement Administration (hereafter, "DEA"). Cavanaugh worked with another civilian, Michael O'Farrell. In April of 1989, Mr. Cavanaugh was approached by Mario Sesma with a request that Mr. Cavanaugh fly Cavanaugh's plane to the country of Colombia, pick up some cocaine and, then, fly that cocaine directly to the Bahamas. The plan was to have boats bring the cocaine into the United States.

Cavanaugh informed the DEA. The DEA then proceeded to control the operation without the knowledge of Sesma and his cohorts. Cavanaugh did not obtain any cocaine during his first flight to Colombia. On May 19, 1989, Cavanaugh and O'Farrell made a DEA-monitored second flight to Colombia. Only those two persons flew inside this plane. Unknown to the criminals, the DEA had Cavanaugh fly to Guantanamo Naval Base in Cuba, where the DEA agents met the plane and verified that there was no cocaine on board that plane at that time. This plane took off from Cuba and flew to an airstrip in Colombia. Six hundred (600) kilos of cocaine were placed on this plane. Cavanaugh and O'Farrell then flew directly to Guantanamo Naval Base. The DEA agents off-loaded this cocaine and took sole possession of it. Their plane emptied of all cocaine, Cavanaugh and O'Farrell flew from Cuba to the Bahamas. The DEA arranged for a Coast Guard helicopter to be at the Bahamian landing spot, where Cavanaugh was supposed to deliver the cocaine. This ruse caused the unknowing waiting criminals to tell Cavanaugh not to land. Cavanaugh and O'Farrell then flew their plane to the Palm Beach, Florida International Airport. Again, these two were met by Customs and DEA agents, who reinspected their plane to be sure that no cocaine was inside. Cavanaugh called Sesma from the DEA office in West Palm Beach, Florida and related a story that he was able to get the cocaine safely into the United States.

As noted above, DEA agents met Cavanaugh's plane, when it landed in Cuba at the Guantanamo Naval Base. There the DEA emptied Cavanaugh's plane of all of the cocaine. This entire load of 600 kilos of cocaine was place

on a DEA plane and flown by DEA agents from Cuba to the international airport located in West Palm Beach, Florida. No one other than DEA agents was inside that DEA airplane, when it flew to Florida. This load of cocaine was temporarily stored by the DEA at its local office.

The next day, May 20, 1989, Cavanaugh called Sesma and arranged to deliver this cocaine at a shopping center in Boca Raton, Florida. The plan was to have the criminals provide a vehicle to Cavanaugh and O'Farrell, who would then drive away, load the cocaine inside the vehicle, and return that vehicle to the criminals. Everything went as planned – so the criminals thought. Actually, the DEA surveilled the entire delivery. The DEA put the cocaine in a van. Cavanaugh then drove the vehicle back to the shopping center and turned that van over to Sesma, who drove it away.

DEA agents observed the delivery of the cocaine by informants Cavanaugh and O'Farrell at the shopping center in Boca Raton. These agents observed Petitioner Delgado and Sesma together. Delgado drove his car around the parking lot and also conferred with Sesma, during the time that Sesma dealt with Cavanaugh. The agents also saw several other criminal participants at the shopping center. The agents observed Sesma drive off in a van filled with the 570 kilos of the cocaine that Cavanaugh delivered and also saw another person named Nunez follow behind in a car. DEA agents followed the van and ultimately stopped it. Sesma and Nunez were arrested at that time.

Late during the evening of May 20th, DEA agents converged on a meeting at an automobile garage in Miami. There the agents arrested several of the group. Petitioner Delgado was among those persons, whom the DEA agents observed and arrested at this time.

Contrary to the testimony elicited against other convicted co-defendants, *no law enforcement agent* testified that he or she either dealt with Petitioner Riverol, talked to Petitioner Riverol, or saw Petitioner Riverol at any time during police surveillance or during any phase of the perpetration of the charged crimes.

The only incriminating testimony against Petitioner Riverol came from former co-defendants, who decided to testify for the Government in exchange for sentencing benefits. As discussed below, these four Government witnesses – Costa, Sesma, Fernandez and Goyanes – had no personal direct knowledge, based on their particular jobs in this criminal enterprise, that Petitioner Riverol was guilty of any crime.

2. Testimony From The Criminal Insiders.

Four of the individuals, who were involved in this criminal activity, pled guilty and testified at this trial.

(a). Mario Sesma

Mario Sesma testified that he was recruited by Jaime Costa to procure a plane and pilot to obtain a load of cocaine from Colombia. Sesma hired David Cavanaugh. Costa was associated with a small group of people, none of whom was Petitioner Juan Delgado. One of the group

members, Albelo, was responsible for communicating with people in Colombia by means of a radio, which was located on a farm in South Dade County, Florida.

On May 19th, the day that the cocaine was to arrive, Sesma met with his cohorts at a restaurant. Sesma was contacted by Cavanaugh and told that Cavanaugh had to fly the cocaine directly into Florida. Group member Albelo then telephoned someone for the purpose of explaining what had happened with the cocaine to people, who were at a superior level to Albelo. A station wagon arrived at the restaurant parking lot. Petitioner Delgado and a woman were inside that vehicle. Albelo talked with them alone. Sesma did not hear that conversation.

On May 20th, Sesma was part of a group of men, including Petitioner Delgado, who drove to Boca Raton for the purpose of picking up the cocaine from Cavanaugh. Albelo told Sesma to drive in a car with Petitioner Delgado. Cavanaugh placed all of the cocaine in one van. Sesma drove the van toward Miami, followed in a car by Nunez. The other members of the group had already left for Miami. Sesma and Nunez were arrested, while driving in Miami and before rejoining their partners in crime.

According to Sesma, Costa twice took Sesma with him to a farm at the southern end of Dade County, Florida from where Costa supposedly called the country of Colombia by radio regarding the cocaine shipment. Sesma never entered the radio room. Costa introduced Sesma to a person whom he called "Juan Carlos," and whom Costa said owned that farm. However, Sesma

never saw Petitioner Riverol do anything illegal during those visits. Likewise, Sesma admitted that he never discussed this illegal importation scheme with "Juan Carlos." Moreover, Sesma was unable to make an in-court identification of Petitioner Riverol as the "Juan Carlos" with whom he had briefly dealt. To Mr. Sesma's memory, on May 19th, he saw "Juan Carlos" at a restaurant, where the group of criminal co-conspirators were meeting to decide if and how to pick up the load of cocaine from Cavanaugh. When Sesma went with the group of individuals to obtain custody of the cocaine at a shopping center in the West Palm Beach, Florida area Petitioner Riverol was not among that large group. Mr. Sesma was the first individual arrested by the DEA for this episode. When Sesma confessed on the day of his arrest, Sesma never mentioned Petitioner Riverol's name.

(2). Manuel Goyanes

Early in 1989, Albelo asked Goyanes, if Goyanes wanted to work with Albelo in bringing in a load of cocaine. The plan was to have a plane fly the cocaine to the Bahamas, where Goyanes was to pick the cocaine up and transport it to the United States by boat. Albelo stated that Petitioner Delgado, who was the man "giving the job," was in Colombia to meet Pedro Nieto. Mr. Nieto was a Cuban, who was a fugitive from the United States, who was then in the country of Colombia, and who was preparing the load of cocaine. Albelo stated that, upon its arrival, the cocaine was to be given to Petitioner Delgado and a woman who was Nieto's wife. In March of 1989, Goyanes met with Albelo, Delgado, and others to discuss the cocaine shipment. While Goyanes was present at

Delgado's house, the group spoke by telephone with Nieto, while the latter individual was in Colombia. Goyanes also went with those individuals to the Riverol farm to use a radio to contact Nieto in Colombia. At that time, Albelo and Delgado used that radio.

On May 19th, Goyanes learned that the plane did not drop off the cocaine in the Bahamas. Goyanes met with Albelo, Sesma, Petitioner Riverol and others at a restaurant to discuss whether to pick up the cocaine from Cavanaugh in Boca Raton. Albelo called Petitioner Delgado, who came. Albelo spoke to Delgado and explained to Delgado what Cavanaugh had stated had happened to the cocaine.

On May 20th, Goyanes, Albelo, Delgado, Sesma, and others drove in various cars to a Boca Raton shopping center to meet Cavanaugh and obtain custody of the cocaine. Later that evening, this entire group, excluding the then-arrested Sesma and Nunez, met at a garage to discuss the fact that the cocaine never arrived in Miami. At that time, DEA agents arrested several of this group.

In terms of Petitioner Riverol, Goyanes testified that the group of individuals with whom he dealt met at Riverol's farm several times. This group went there to use a shortwave radio that was located on the farm. Petitioner Riverol gave them permission to use the radio. Importantly, Goyanes testified that Mr. Riverol was not involved in any of that group's discussions about the cocaine deal, and was never in the radio room. Rather, Goyanes stated that Riverol was only occasionally present on the seven-acre farm doing farm work while Goyanes and his cohorts were there. Goyanes recalled

that Petitioner Riverol was present on May 19th at a public restaurant, when approximately ten men met regarding a pickup of the cocaine that Cavanaugh supposedly flew into Florida. To Goyanes' memory, Riverol stated that the group should not retrieve the cocaine from Cavanaugh. Although Goyanes was among those who went to the shopping center on the next day to obtain possession of the cocaine, Petitioner Riverol did not go.

Witness Goyanes related more information. After Cavanaugh delivered the cocaine and it never arrived in Miami, then-unarrested criminal participants could not figure out why the cocaine never arrived back in Miami. According to Goyanes, one of the criminals named Albelo called Riverol to find out what happened. Supposedly, Riverol told Albelo and Goyanes to meet at an auto repair shop in Miami. About ten people came to this meeting at the garage. Goyanes stated that Mr. Riverol was one of those, who was present.

(3). Jose Fernandez

Jose Fernandez became associated with this criminal venture through Jamie Costa. In early 1989, Goyanes approached Jaime Costa, and stated that Albelo had a load of cocaine to be flown from Colombia. Fernandez met with Costa, Albelo and Goyanes several times to plan an airplane flight to the Bahamas. Albelo and Goyanes were to pick up the load of cocaine in the Bahamas and then transport that cocaine by boats from the Bahamas into the United States. Fernandez also dealt with Mario Sesma, who obtained a piloted plane from Cavanaugh.

Fernandez was in the Bahamas, when Cavanaugh's plane arrived. Fernandez was the person who told Cavanaugh not to land because of the presence of a Coast Guard helicopter at the landing sight. After communicating with Costa, Fernandez returned to Miami on May 20th. Fernandez and Costa did not travel to Boca Raton to assist in picking up the cocaine from Cavanaugh.

Fernandez never met Petitioner Delgado until Fernandez came to the meeting, which was held at the auto center on May 20th.

Fernandez provided minimal evidence against Petitioner Riverol. Fernandez corroborated the fact that the group used a radio located at Mr. Riverol's farm. However, Fernandez admitted that he, himself, never spoke with Petitioner Riverol, and that Petitioner Riverol was never present in the radio room when Fernandez was there. Fernandez was among approximately ten people, who met at an automotive garage on the evening of May 20th in an attempt to find out why the cocaine did not arrive in Miami after it was picked up from Cavanaugh at the shopping center. Fernandez observed Petitioner Riverol there at that time, but conceded that he, Fernandez, did not talk with Riverol at all.

(4). Jaime Costa

Albelo and Goyanes came to Costa and requested Costa to obtain a plane to bring cocaine into the United States. Costa then utilized Sesma to obtain the plane and pilots. Costa introduced Sesma to Goyanes, Albelo, and other members of this group. This group was dealing in Colombia with Pedro Nieto. This group used a radio at

Riverol's farm to contact Colombia. At that time, Costa and Goyanes talked by radio with Pedro Nieto.

Costa was at the restaurant meeting during which the group discussed whether they would pick up the cocaine from Cavanaugh. At this meeting, Costa observed Goyanes, Albelo, and Petitioner Riverol. Goyanes and Albelo told Costa that they would have to call the people responsible for the cocaine in Miami. Those people were identified as "Carlos" and Petitioner Delgado.

During the evening of May 20th, Costa attended the meeting at the automobile repair center. At that time, Costa saw Petitioner Delgado along with others.

Mr. Costa testified that he was a friend of Petitioner Riverol for ten years. Costa used the radio on Riverol's farm to call Colombia regarding the cocaine. Costa asked Mr. Riverol if Costa could use the radio. However, Costa did not discuss anything about the drug trip, or why Costa wanted to use that radio. Moreover, Riverol did not accompany Costa when Costa used the radio. Costa testified that Petitioner Riverol was present at the May 19th meeting at a restaurant, but that Riverol did not say anything at that time. Finally, Costa related that Petitioner Riverol was also present at the May 20th meeting at the automotive garage.

Petitioner Delgado was convicted of four crimes, namely importation, conspiracy to import, possession with intent to distribute, and conspiracy to possess. The trial judge imposed a sentence of 31.25 years of imprisonment on Petitioner Delgado.

Initially, the jury could not reach a verdict on whether Petitioner Riverol was guilty of any of the four crimes. Finally, after it was given an *Allen* charge on the second day of deliberations, the jury convicted Mr. Riverol of only one of the four crimes with which he had been charged, namely, conspiracy to import. Riverol was acquitted of the remaining three charges. The trial court sentenced Petitioner Riverol to serve 15 years in prison.

REASONS FOR GRANTING THE PETITION

Question One

During closing argument, the prosecutor stated:

> Now, whether you're offended or not by paying Dave Cavanaugh $218,000 over two years for what he did, you shouldn't hold that against Dave Cavanaugh. That doesn't do anything to Dave Cavanaugh's credibility. The United States of America, *your government*, the DEA, paid Dave Cavanaugh those amounts. They *paid Dave Cavanaugh those amounts in their "War on Drugs."* If you have a problem with Dave Cavanaugh receiving that kind of money, your problem is with the government, it is not with Dave Cavanaugh and it shouldn't reflect on the credibility of Dave Cavanaugh as he testified in this courtroom.

MR. MOORE: Judge, may I note an objection to the reference to, "War on Drugs"?

> THE COURT: Pardon?
>
> MR. MOORE: Objection to the prosecutor's reference to the "War on Drugs."
>
> THE COURT: *Overruled.* We're not here to try the War on Drugs, folks. Just the issues in this case.

More than fifty years ago, this Court condemned a similar closing argument, which then played upon the loyalty of the jurors to the war effort during World War II. This Court noted that it was impermissible to arouse the jury's passion and prejudice in such a manner. *Viereck v. United States,* 318 U.S. 236 at 247-248 (1943).

In this case, the lower court ignored this Court's precedent. Relying on *United States v. Zielie,* 734 F.2d 1447 at 1460-1461 (11th Cir. 1984) (remark that jury should show sympathy to the people who suffered the effects of millions of pounds of marijuana held neither improper nor unduly prejudicial and not excessively inflammatory), the lower appellate court curtly found no error in the overruling of the defense objection to that argument.

There is apparent conflict among the lower federal circuit courts of appeals on the issue of whether "war on drugs" arguments are permissible weapons in the oratorical arsenal of federal prosecutors. *Compare United States v. Delgado,* 56 F.3d 1357 at 1369-1370 (11th Cir. 1995); *United States v. Zielie,* 734 F.2d 1447 at 1460-1461 (11th Cir. 1984); *United States v. Ferguson,* 935 F.2d 1518 at 1530-1531 (7th Cir. 1991); *United States v. Brown,* 887 F.2d 537 at 542 (1989) *with United States v. Beasley,* 2 F.3d 1551 at 1559-1560 (11th Cir. 1993); *United States v. Johnson,* 968

F.2d 768 (8th Cir. 1992); *United States v. Solivan*, 937 F.2d 1146 (6th Cir. 1991).

Any criminal litigator knows that closing argument can be decisive in swaying a jury to reach the desired result. The type of argument unleashed during this trial is impermissible, not merely because it seeks to inflame a jury's passions and prejudice, but because it seeks to make a criminal defendant pay for a societal problem on a basis irrelevant to individual guilt or innocence.

Here, the prosecutor's argument sought to mentally work on both the jury's allegiance to its federal government and the jury's concern with the drug problem. That this was the intent is clear from the irrationality of the prosecutor's logic. Historically and universally, payment of money to a witness is deemed a motive to lie. Indeed, when courtroom testimony is "bought" by a civilian, the Government labels it a crime. Yet here, the prosecutor argues that because it is this jury's Government that is making the payments and because there is a "war on drugs" that must be fought, the jurors should disregard a witness' financial motive to lie. Obviously, there was more purpose in making this argument than to divert the jury's focus from the probable effect of the payment of money on the witness to the motive of the Government in making that payment. Indeed, the prosecutor's reasoning reinforces the prejudice by stating that anything is O.K. if done to fight our "war on drugs."

The trial judge's terse supposed counter-comment could hardly be perceived by the jury as a neutralizing one, when the jury also heard this judge simultaneously approve this prosecutorial argument.

Unfortunately, criminal drug prosecutions constitute the largest segment of the criminal prosecutions litigated in the federal trial courts. That fact makes this issue a significant one worthy of review by this Court.

Question Two[1]

In Count Two of the indictment, Mr. Delgado was charged with violating 21 United States Code Section 952(a) and 18 United States Code Section 2 by "import[ing] [cocaine] into the United States from a place outside thereof."

The facts relative to this issue have already been related in the Statement Of The Case and are not in dispute. Simply stated, the Government established the following:

David Cavanaugh and Michael O'Farrell were civilian informants for the DEA. Both were hired by the conspirators to fly a plane to the country of Colombia, pick up cocaine and fly it to the Bahamas. Unknown to the criminal conspirators, the DEA altered those criminals' plan. Cavanaugh and O'Farrell insisted that only they fly inside the plane, when it made its trip. The DEA directed Cavanaugh and O'Farrell to fly to the United States Naval Base at Guantanamo Bay, Cuba. There, the DEA searched the plane and made sure that it was empty of any contraband. Only Cavanaugh and O'Farrell flew from Cuba to Colombia, picked up the cocaine and flew

---

[1] This question applies only to Petitioner Delgado. Petitioner Riverol was acquitted of the substantive charge of importation.

back to the United States Naval Base at Guantanamo Bay, Cuba. At that time, DEA agents emptied this plane of all of the cocaine. Cavanaugh and O'Farrell took off, flew to the Bahamas and, without landing, flew to Palm Beach, Florida. Federal agents verified that this plane had no cocaine on board, when it landed in Florida. The cocaine, which Cavanaugh brought to Cuba, was flown from Guantanamo Bay, Cuba into Florida only by DEA agents, who did not act at the request of, with the assistance of, or with the knowledge of any criminal conspirator.

The fact that the two civilians, Cavanaugh and O'Farrell, were acting as informants under instructions from the DEA does not, itself, absolve Mr. Delgado of criminal liability for the crime of importation, if Cavanaugh transported the cocaine into the United States at the request of the criminals. *United States v. Meinster,* 619 F.2d 1041 (4th Cir. 1980); *United States v. Moreno,* 878 F.2d 817 (5th Cir. 1989); *Haynes v. United States,* 319 F.2d 620 (5th Cir. 1963); *Jordan v. United States,* 428 F.2d 7 (9th Cir. 1970); *Corcoran v. United States,* 427 F.2d 16 (9th Cir. 1970); *United States v. Gould,* 419 F.2d 825 (9th Cir. 1969); *McClain v. United States,* 417 F.2d 489 (9th Cir. 1969); *Pederson v. United States,* 392 F.2d 41 (9th Cir. 1968); *Juvera v. United States,* 378 F.2d 433 (9th Cir. 1967). However, there is no dispute that Cavanaugh and O'Farrell never flew cocaine into the State of Florida.

It is true that the DEA agents flew the cocaine into the State of Florida. Not only was that act of transportation not part of the criminal plan, more importantly, it was an innocent act, as a matter of law. 21 U.S.C. § 885(d).

It is true that Cavanaugh and O'Farrell need not be either prosecuted or convicted of the crime of importation, in order to convict Mr. Delgado on the theory that he aided and abetted their conduct. *Standefer v. United States*, 447 U.S. 10 (1980). However, there can be no conviction for aiding and abetting someone to do an innocent act. *Shuttlesworth v. City of Birmingham*, 373 U.S. 262 (1963). It is still necessary that there be evidence showing that a crime was committed by a principal. *Hendrix v. United States*, 327 F.2d 971 (5th Cir. 1964). Thus, the issue is whether Cavanaugh and O'Farrell committed the crime of importation, when this pair flew the cocaine from Colombia to the United States Naval Base at Guantanamo Bay, Cuba. The critical statutory phrase, which was charged in the indictment, is "import into *the United States* from any place outside thereof."[2] 21 U.S.C. § 952(a).

---

[2] The statute in question also makes it a crime "to import into the customs territory of the United States from any place outside thereof (but within the United States). . . . " 21 U.S.C. § 952(a). That means of committing the crime is irrelevant to this litigation for two reasons.

First, the indictment did not charge Mr. Delgado with committing the crime in that manner. Moreover, the jury was not instructed that it could convict on that theory of criminal liability. Consequently, conviction by use of that theory of prosecution would require an illegal constructive amendment of the indictment. *See United States v. Miller*, 471 U.S. 130 (1985).

Second, the phrase "customs territory of the United States" by statutory definition "includes *only* the States, the District of Columbia and Puerto Rico." 21 U.S.C. § 951(a)(2); 19 U.S.C. § 1502 (Harmonized Tariff Schedule of the United States) general note 2. Thus, bringing cocaine into the United States Naval Base at Guantanamo, Cuba would not be covered by this portion of the statute.

The term "United States" was defined in the original statutory enactment of this crime in the year 1970 and still maintains its initial wording. That term, "when used in a geographic sense, means all places and waters, continental or insular, subject to the jurisdiction of the United States." 21 U.S.C. §§ 802(28) and 951(b); Pub. L. No. 91-513 § 102, 84 Stat. at 1245.

One need not give much thought to this matter to determine that, taken in a light most favorable to the Government, the pertinent drug control statutes are ambiguous on the issue of whether the United States Naval Base at Guantanamo Bay, Cuba is inside "the United States" for the purpose of commission of the crime of importation into it.

Initially, it is clear that the concept of the "United States" referred to in this statute must be territorial in nature. The pertinent criminal statute refers to this term as being used in its "geographic sense." 21 U.S.C. § 802(28). Next, one must observe that the criminal laws of the United States cover the entire world, because they can reach the conduct of United States citizens, who are undisputably inside a foreign country. *Skirotes v. Florida*, 313 U.S. 69, 73-74 (1941); *Blackmer v. United States*, 234 U.S. 421, 436-437 (1932). If "jurisdiction" is defined in this manner, i.e. as covering any place that Congress's laws can reach, the crime of importation could only be committed by flying a spaceship into the Earth's atmosphere from outside that planet with drugs aboard. That broad a construction would be an absurd construction of the term "United States." Thus, the only rational issue becomes

whether the United States Naval Base located at Guantanamo Bay, Cuba is sovereign territory of the United States.

Even after the Spanish-American War, the Island of Cuba was considered a foreign territory that was in no sense a part of the territory of the United States. *Pearcy v. Stanahan,* 205 U.S. 257 (1907). The United States Naval Base at Guantanamo Bay, Cuba is territory of the country of Cuba, which has been leased to the country of the United States since the year 1903 and pursuant to a treaty between those two nations. 48 Stat. 1682 at 1683. In terms of sovereignty, this naval base is not within the territorial jurisdiction of the United States. *Vermilya-Brown, Co. v. Connell,* 335 U.S. 377 (1948).[3]

---

[3] In *Vermilya-Brown,* this Court had great difficulty ascertaining whether Congress intended the Fair Labor Standards Act to cover a United States Naval Base, which was located on the Island of Bermuda. Treating the issue as a matter of statutory interpretation as to whether or not that statute was effective beyond the limits of national sovereignty, this Court finally held that this naval base was a "possession" of the United States within the reach of that statute.

The issue presented here is more difficult than that faced in *Vermilya-Brown, Co.* The issue is not whether a criminal statute can reach conduct at the United States Naval Base at Guantanamo Bay, Cuba it can, *Skirotes v. Florida,* 313 U.S. 69, 73-74 (1941). Rather, the issue is what crime the particular conduct constitutes. Restated, the issue becomes whether, for example, a dependent of a military person, who obtains drugs off the foreign base and walks onto that military base can be prosecuted only for possession or can be prosecuted for both importation and possession.

Congress has not included the United States Naval Base at Guantanamo Bay, Cuba within its legislation contained in Title 48 of the United States Code that concerns United States Territories and Insular Possessions. By contrast, the Northern Mariana Islands are covered by Title 48, 48 U.S.C. §§ 1681, 1694, and have been held to be a part of the United States for the purpose of the crime of importation, 21 U.S.C. § 952, because of this fact. *United States v. Perez*, 776 F.2d 797 (9th Cir. 1985).

Recently, *Cuban American Bar Assoc., Inc. v. Christopher*, 43 F.3d 1412 at 1425 (11th Cir. 1995) held that the leased military base at Guantanamo Bay, Cuba is not the functional equivalent to being a land border or port of entry of the United States or otherwise within the United States.

On this issue, legislative history does not eliminate ambiguity. The definition for the term "United States" is the same today as it was in the initial legislation enacted in the year 1970. Pub. L. No. 91-513 § 102, 84 Stat. at 1245. The House Committee Report amplified this definition by adding the description "and is intended to include the Canal Zone and the Trust Territory of the Pacific Islands." House Report No. 91-1444, 1970 U.S. Code Cong. & Ad. News at 4599. In the year 1970, if Congress intended all of the military bases throughout the world to be within the definition of the term "United States" for the purpose of importation of controlled substances, Congress could have – and should have – done so in that legislation.

There is a body of law regarding whether a criminal statute has extraterritorial application. The principle in that regard is that a criminal statute is presumed not to

have extraterritorial application unless Congress makes specific provision that the locus of the crime includes a foreign country or unless extraterritorial statutory applicability can be inferred from the nature of the crime. *United States v. Bowman*, 260 U.S. 94 (1922); *see E.E.O.C. v. Arabian American Oil Co.*, 499 U.S. 244 (1991). That legal concept has no bearing on resolution of this issue. An inquiry of that nature constitutes a classic example of an inquiry that begs the question. Here, the very issue is what is territorial and what is extraterritorial.

This issue concerns whether particular conduct is criminal or not under the elements of a particular statute. When all is said and done, there is a serious question of whether military dependents living on a foreign military base, or civilian employees working at a foreign military base, or foreign nationals working in their own country but on a United States military base have been given fair warning about the crime of importation of a controlled substance into the United States.[4] There is no question that after examining all extrinsic sources, ambiguity remains as to whether a military base, which is located inside a foreign country on leased land, is the "United States." The rule of lenity mandates that this Court construe that term to *not* include a military base in a foreign

---

[4] This issue will not affect military personnel, who likely will be prosecuted under the Uniform Code of Military Justice. However, court-martial jurisdiction cannot be extended to reach any person not a member of the Armed Forces at the time of both the offense and the trial. *O'Callahan v. Parker*, 395 U.S. 258, 267 (1969). Thus, there are a significant group of people to whom this issue is of great importance.

country, such as the United States Naval Base at Guantanamo Bay, Cuba. *Crandon v. United States*, 494 U.S. 152, 158 (1990).

Certainly, the usefulness of the criminal importation provision is not destroyed by holding that a foreign military basis is not "the United States" for the purpose of determining whether the crime of importation of a controlled substance had been committed. A civilian employee, who worked at a foreign military base, or a dependent of a military person, who lived on that base, or an alien would still be guilty of the crime of importation, if he or she transported drugs to United States territory from that military base. Nothing rational is gained by making the crime of importation broader than that.

The resolution of this legal issue by the lower appellate court makes it even more enticing for this Court to review. The lower appellate court held that the crime of aiding importation was committed in this case, merely because the criminals had a proprietary interest in the cocaine. However, having a proprietary interest in the drugs *is not a criminal act of importation*. Rather, what the lower appellate court described was the crime of possession.

CONCLUSION

For the above-stated reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

Counsel For Petitioners

ARTHUR JOEL BERGER
Suite 506
9200 South Dadeland Blvd.
Miami, Florida 33156
Phone: (305) 670-0067

APPENDIX

Page

Opinion Of The Lower Appellate Court.....App. 1

Order Denying Rehearing.....App. 32

UNITED STATES of America,
Plaintiff-Appellee,

v.

Juan DELGADO, Emilio Albelo, Juan Carlos Riverol, Tomas Raul Hernandez,
Defendants-Appellants.

No. 92-4141.

United States Court of Appeals,
Eleventh Circuit.

July 5, 1995.

Appeals from the United States District Court for the Southern District of Florida.

Before COX and BLACK, Circuit Judges, and FAY, Senior Circuit Judge.

FAY, Senior Circuit Judge:

This appeal arises from a four-count conviction on assorted drug charges against Appellants/Co-Defendants Delgado and Albelo, a two-count conviction against Appellant/Co-Defendant Hernandez, and a one-count conviction against Appellant/Co-Defendant Riverol. Except as to Hernandez, the indicted activity involved a conspiracy and a substantive count for both importation and possession with intent to distribute at least five kilograms of cocaine.

The appellants allege myriad errors in the trial.

App. 2

I. BACKGROUND

i. Procedure

In May of 1988 a federal grand jury in Miami returned a six-count indictment charging Delgado and five other men with the following: conspiracy to import at least five kilograms of cocaine; importation of at least five kilograms of cocaine; conspiracy to possess with intent to distribute at least five kilograms of cocaine; and possession with intent to distribute at least five kilograms of cocaine. Other charges against Delgado alone were severed before trial.

In March of 1990 another grand jury returned a superseding indictment, adding Albelo, Riverol, and four other men as defendants in each of the four counts. Hernandez and another man were added as defendants only in the conspiracy and substantive counts of possession with intent to distribute. In July of 1991 Delgado, Albelo, Riverol, Hernandez, and another man went to jury trial. The jury convicted Delgado, Albelo, and Hernandez on all counts; the jury convicted Riverol of conspiring to import at least five kilograms of cocaine, but acquitted him on all other counts; the jury acquitted the fifth man on all counts.

ii. Facts

Evidence admitted at trial permitted the jury to find the following facts:

Early in 1989 Emilio Albelo contacted Manual Goyanes about working for Juan Antonio Delgado as a cocaine smuggler. Delgado was in Colombia visiting a

federal fugitive who could provide 300 kilograms of cocaine. The cocaine was to be picked up in Colombia, flown to Treasure Cay in The Bahamas, and then taken by fast boats to South Florida. Delgado and the fugitive's wife were to receive the cocaine in the United States.

While planning the conspiracy, Delgado held several meetings, including one at a Taco Bell in Miami. The conspirators also met three to four times a week at Delgado's home. In addition, they met three to four times a week at Riverol's farm in Homestead, where they used Riverol's high-powered radio to contact the federal fugitive in Colombia. The conspirators used the radio because it was more difficult to trace than a phone call.

Unfortunately for the conspirators, the pilots they had chosen to smuggle the drugs were arrested in Nassau, The Bahamas, on an unrelated drug run and the plane was seized by Bahamian law enforcement. Next, the conspirators contacted two American friends, Mike and Dave. Unbeknownst to the conspirators, Mike and Dave were undercover operatives working for the Drug Enforcement Administration ("DEA"). They reported the contact to the DEA and began to set up a sting operation. The conspirators offered Mike and Dave $200,000 to fly 500 kilograms of cocaine from Colombia to Treasure Cay. Later, the expected payment was increased to $250,000 plus $15,000 for expenses, and the load was increased to 600 kilograms.

On May 10, 1989, Mike and Dave flew to Colombia in accord with the plan. In Colombia, however, they were unable to make radio contact with anyone. They returned to Florida and reported this trouble to the conspirators.

The conspirators confirmed the problem in Colombia and scheduled a second attempt.

On May 19, 1989, Mike and Dave again left for Colombia. As they had done on the first trip, they stopped at Guantanamo Naval Base to be checked by DEA agents before continuing to Colombia. One conspirator waited in Treasure Cay to make radio contact with the plane; two others, one of whom was Albelo, readied themselves in Fort Lauderdale with a boat to pick up the cocaine once it reached The Bahamas.

Mike and Dave landed in Colombia at 2:45 a.m. Armed individuals helped Dave load green padlocked duffel bags onto the aircraft. He then flew back to Guantanamo, where he met a DEA Special Agent. The DEA unloaded the bags, which contained around 600 kilograms of cocaine, counted and initialed them. DEA pilots and the Special Agent flew the cocaine into West Palm Beach.

Meanwhile, Mike and Dave flew towards Treasure Cay, where the DEA had placed a Coast Guard helicopter to create a cover story to explain why Mike and Dave could not land in The Bahamas. The conspirator stationed at Treasure Cay saw the helicopter, warned Mike and Dave by radio not to land, and instructed them to drop the cocaine onto Abaco Island. Dave said he could not do that and would take the cocaine into the United States. Mike and Dave landed their empty plane at Palm Beach International Airport and notified the conspirators that they had arrived safely and needed to know what to do with the cocaine.

The conspirators were unnerved, called a meeting, and debated whether to take the cocaine. Some members were concerned the DEA had engineered the successful flight into the United States. Finally they decided two conspirators would pick up the cocaine the following day while the remaining conspirators provided surveillance and protection. Meanwhile, the DEA planned their own surveillance of the controlled delivery.

The delivery took place in a Boca Raton shopping center. Mike and Dave met with the conspirators and got their approval to drive to another location to place the cocaine in a van that, unbeknownst to the conspirators, had been equipped with a kill switch by a DEA agent. Dave returned with the van loaded with 570 kilograms of cocaine and gave the keys to one of the conspirators. Two conspirators drove the van out of the parking lot and the others followed in several cars. DEA agents followed as well. Once the van reached Miami the DEA activated the kill switch, stopping the van, and arrested the two men on board. They took a digital pager from one of them.

At 10:00 p.m. the pager was activated and the number to a pay phone was left. The DEA, in possession of the beeper, traced the number and dispatched agents. Upon arrival the agents recognized Delgado and other conspirators and their cars. DEA agents arrested Delgado, Albelo and others. Hernandez and Riverol were not arrested; the government contends they got away before the agents could identify them.

A couple months later, and unrelated to the events charged in the indictment, Hernandez was arrested while

trying to buy twelve kilograms of cocaine from an undercover police officer. As a result he was convicted of conspiring to distribute and attempting to possess with intent to distribute over five kilograms of cocaine.

II. STANDARDS OF REVIEW

This appeal requires review of findings of fact, conclusions of law, and discretionary rulings on whether to admit or exclude evidence.

We will not disturb the trial judge's decision to admit or exclude Fed.R.Evid. 404(b) "other crimes" evidence absent a clear showing of abuse of discretion. *United States v. Miller*, 959 F.2d 1535, 1538 (11th Cir.1992) (en banc).

We will not disturb the trial judge's Jencks Act findings absent clear error. *United States v. Williams*, 875 F.2d 846, 853 (11th Cir.1989).

We review evidence sufficiency, a question of law, *de novo*. *United States v. Kelly*, 888 F.2d 732, 739 (11th Cir.1989). We view the evidence in the light most favorable to the government including all reasonable inferences and credibility judgments. *See Glasser v. United States*, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942). We ask whether a reasonable trier of fact, when choosing among reasonable constructions of the evidence, could have found the defendant guilty beyond a reasonable doubt. *Kelly*, 888 F.2d at 740.

Because improper vouching is a mixed question of law and fact, and because the defendants objected contemporaneously at trial, our review is plenary. *United*

States v. Eyster, 948 F.2d 1196, 1206 (11th Cir.1991). Prosecutorial misconduct requires a new trial only if we find the remarks (1) were improper and (2) prejudiced the defendants's substantive rights. *United States v. Cannon*, 41 F.3d 1462, 1466 (11th Cir.1995). We review them in context and assess the probable jury impact. *Id.*

We review a trial judge's response to a jury query during deliberations for an abuse of discretion. *United States v. McDonald*, 935 F.2d 1212, 1221-22 (11th Cir.1991).

A sentencing court's determination under the Federal Sentencing Guidelines of a defendant's role in the offense is a factual finding. *United States v. Castillo-Valencia*, 917 F.2d 494, 501 (11th Cir.1990), *cert. denied*, 499 U.S. 925, 111 S.Ct. 1321, 113 L.Ed.2d 253 (1991). We do not disturb the sentencing court's fact findings absent clear error. 18 U.S.C. § 3742(e); *United States v. Davis*, 902 F.2d 860, 861 (11th Cir.1990). Nonetheless, we review *de novo* the sentencing court's Federal Sentencing Guidelines application to those facts. *United States v. Rodriguez*, 959 F.2d 193, 195 (11th Cir.1992), *cert. denied*, ___ U.S. ___, 113 S.Ct. 649, 121 L.Ed.2d 563 (1992).

III. ANALYSIS

A. The Jencks Ruling

i. Government Witness Costa

The chief error alleged by Riverol and Delgado is the district court's denial of a timely motion for disclosure of material they allege falls under the Jencks Act, 18 U.S.C. § 3500. Upon review of the record we find no judicial

error. Defense counsel failed to lay the predicate required to invoke the Jencks Act protections.

Jaime Costa, a cooperating co-defendant, testified for the government against Riverol, Delgado, and the other defendants. Costa's direct testimony comprised his own drug crimes for the nine years preceding his arrest. Defense counsel requested the DEA agent's notes from debriefings of Costa on these other crimes. The prosecutor responded that neither he nor the DEA agent in the instant case had participated in the debriefings and neither of them had seen the requested DEA-6's because they exclusively concerned the other, unrelated crimes. Defense counsel argued they were entitled to the reports because anything tending to show bias or prejudice relates to the subject matter of the witness's testimony as required by Jencks. In the alternative, defense counsel requested the reports be produced and sealed as part of the appellate record. The trial judge denied the defense motion.

The Jencks Act applies to any witness statement in the United States's possession that relates to the subject matter of the witness's direct testimony. 18 U.S.C. § 3500. Statement, however, is a legal term of art. Agents's reports of witness interviews, or debriefings, are not Jencks statements unless they are substantially verbatim, contemporaneously recorded transcripts, or are written by the witness and signed or otherwise ratified by the witness. 18 U.S.C. § 3500(e)(1)-(2); *United States v. Cōle,*

634 F.2d 866, 867 (5th Cir.),[1] *cert. denied*, 452 U.S. 918, 101 S.Ct. 3055, 69 L.Ed.2d 422 (1981); *United States v. Gaston*, 608 F.2d 607, 611 (5th Cir.1979).

Further, the defense must establish that the document falls within the reach of Jencks. *Gaston*, 608 F.2d at 611. The district court need not examine the reports *in camera* when nothing before it suggests a verbatim account or adoption by the witness. *Id.* When defense counsel fails to establish Jencks applies, the trial court does not err in refusing to order the government to produce reports for inclusion in the record. *Id.* Jencks does not authorize fishing expeditions, *United States v. Graves*, 428 F.2d 196, 199 (5th Cir.), *cert. denied*, 400 U.S. 960, 91 S.Ct. 360, 27 L.Ed.2d 269 (1970); the foundation must be laid before the protections are triggered.

In the instant case, defense counsel failed to lay that predicate. The only defense lawyer to attempt the foundation, counsel for Hernandez, elicited testimony that the witness had never adopted or approved the reports; the agent never read back his notes or asked Costa to confirm their accuracy (R. 12:1342). In addition, the defense proffered nothing to show the statements were verbatim transcripts. Based on these facts and the controlling caselaw, we conclude the trial court properly found the statements did not come under the Jencks Act and therefore were not subject to compelled production.

---

[1] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981) (en banc), this Court adopted as binding precedent all cases decided by the former Fifth Circuit, including both Units A and B, before October 1, 1981.

ii. "Other Crimes" Evidence Against Hernandez

Hernandez argues the trial court erred in denying his motions to strike or dismiss for alleged violations of the Jencks Act when the government did not provide transcripts of prior grand jury and trial testimony by the 404(b) witness. *See* III.B. below. We disagree.

The following factors impel us to conclude the error, if any, was harmless: Jencks Act statements are strictly limited to impeachment. *Palermo v. United States*, 360 U.S. 343, 349, 79 S.Ct. 1217, 1223, 3 L.Ed.2d 1287 (1959). The most Hernandez could have achieved with the requested statements was to discredit the agent who gave 404(b) testimony regarding the separate, later, unrelated crime. Most important, independent evidence linking Hernandez to the crimes charged in the instant case was overwhelming. *See* III.C.ii. below. Strictly applying the harmless error standard, *see Goldberg v. United States*, 425 U.S. 94, 111 n. 21, 96 S.Ct. 1338, 1348 n. 21, 47 L.Ed.2d 603 (1976), we find no reversible error.

B. Evidentiary Rulings

Approximately two months after the culmination of the crimes charged in this case, Hernandez was arrested for conspiracy and attempt to possess with intent to distribute at least five kilograms of cocaine. The following year Hernandez went to trial and was convicted of both the conspiracy and attempt counts. This conviction did not relate to the two counts charged against Hernandez in the instant case. Hernandez argues the district judge violated his right to a fair trial by admitting this

Fed.R.Evid. 404(b) "other crimes" evidence in the case on appeal. We disagree.

First, we note the principles governing what is commonly referred to as other crimes evidence[2] are the same whether the conduct occurs before or after the offense charged, and regardless of whether the activity might give rise to criminal liability. *United States v. Beechum*, 582 F.2d 898, 903 n. 1 (5th Cir.1978) (en banc), *cert. denied*, 440 U.S. 920, 99 S.Ct. 1244, 59 L.Ed.2d 472 (1979). Thus, that the conduct and conviction at issue occurred after the crimes charged against Hernandez here does not change our analysis. We look to *Beechum*,[3] the seminal case in any Eleventh Circuit 404(b) analysis, and its progeny to discern whether the district judge abused his discretion in admitting the other crimes evidence against Hernandez.

Beechum, as expounded upon in *United States v. Miller*, 959 F.2d 1535 (11th Cir.) (en banc), *cert. denied*, ___ U.S. ___, 113 S.Ct. 382, 121 L.Ed.2d 292 (1992), establishes a three-part test to evaluate the admissibility of Rule 404(b) evidence: First, the evidence must be relevant to an issue other than the defendant's character; Second, the act must be established by sufficient proof to permit a jury finding that the defendant committed the extrinsic act; Third, the probative value of the evidence must not be substantially outweighed by its undue prejudice, and the evidence

---

[2] We will refer to the unrelated conviction as "other crimes evidence" and "extrinsic offense or crime" interchangeably.

[3] The United States Supreme Court endorsed the *Beechum* analysis in *Huddleston v. United States*, 485 U.S. 681, 108 S.Ct. 1496, 99 L.Ed.2d 771 (1988).

must meet the other requirements of Rule 403. *See Miller*, 959 F.2d at 1538.

The extrinsic act introduced against Hernandez involves a conviction: the second prong being met, we test only the first and third prongs. We have no trouble finding the first prong is met. A defendant who enters a not guilty plea makes intent a material issue, imposing a substantial burden on the government to prove intent; the government may meet this burden with qualifying 404(b) evidence absent affirmative steps by the defendant to remove intent as an issue. *See United States v. Cardenas*, 895 F.2d 1338, 1342 (11th Cir.1990). Hernandez presented a "mere presence" defense, forcing the government to prove his criminal intent so as to negate any innocent explanation for his presence. The other crimes evidence went to intent, not character.

Moreover, in satisfaction of the first prong, the evidence was relevant to intent. We conclude this by comparing the defendant's state of mind in committing both the extrinsic and charged offenses. *Beechum*, 582 F.2d at 911. *Beechum* reasons that "because the defendant had unlawful intent in the extrinsic offense, it is less likely that he had lawful intent in the present offense." *Id.* at 912. In the instant case, the elements of the extrinsic conviction and the crimes charged are identical, except the extrinsic conviction involved the inchoate crime of attempt rather than actual possession. The state of mind required for both offenses is the same, making the extrinsic crime relevant to the charged crime. *United States v. Kopituk*, 690 F.2d 1289, 1334 (11th Cir.1982), *cert. denied*, 463 U.S. 1209, 103 S.Ct. 3542, 77 L.Ed.2d 1391 (1983).

Accordingly, we find Hernandez's extrinsic conviction is relevant to his intent in the case at hand.

Likewise, the other crimes evidence meets the third prong of the *Beechum* test. Its probative value is not substantially outweighed by any prejudice to Hernandez. Hernandez argues that because the 404(b) testimony formed the bulk of the evidence against him its prejudice substantially outweighed any probative value. Hernandez's counsel misreads the law. While the strength of the government's case regarding intent is important in comparing probative value and prejudice, "[t]he greater the government's need for evidence of intent, the more likely that the probative value will outweigh any possible prejudice." *United States v. Hicks*, 798 F.2d 446, 451 (11th Cir.1986), *cert. denied*, 479 U.S. 1035, 107 S.Ct. 886, 93 L.Ed.2d 839 (1987); *see also United States v. Diaz-Lizaraza*, 981 F.2d 1216, 1225 (11th Cir.1993); *Cardenas*, 895 F.2d at 1344.

Hernandez further argues that the lack of similarity in the drug crimes – one involved a major, multi-million dollar importation while the other involved a comparatively small amount purchased from an undercover law enforcement agent in the states – renders the evidence far more prejudicial than probative. We disagree. In *Cardenas* this Court iterated that when other crimes evidence goes to intent rather than identity a lesser degree of similarity between the charged crime and the uncharged crime is required. *See id.*, 895 F.2d at 1342. Here, "the extrinsic offenses were very similar to the charged offenses in their overall purpose – trafficking in cocaine." *Hicks*, 798 F.2d at 451 (upholding Rule 404(b) admissibility of prior dealing in substantially smaller amounts of cocaine). The

government introduced the other crimes evidence to counter Hernandez's mere presence defense and prove his intent. We find the extrinsic conviction to be highly probative.

Moreover, our Circuit has found that extrinsic drug offenses do not tend to incite a jury to an irrational decision. *See Hicks*, 798 F.2d at 452; *United States v. Richardson*, 764 F.2d 1514, 1523 (11th Cir.), *cert. denied*, 474 U.S. 952, 106 S.Ct. 320, 88 L.Ed.2d 303 (1985). We cannot conclude the probative value of the other crimes evidence introduced at trial was substantially outweighed by any unfair prejudice to Hernandez. We find that the evidence meets the third prong of the *Beechum* test.

Having found each prong of the *Beechum* test met, we conclude the trial judge did not abuse his discretion by admitting the other crimes evidence to prove Hernandez's intent to both conspire and possess with intent to distribute cocaine.

C. Sufficiency of the Evidence

i. Delgado

The jury convicted Delgado under 18 U.S.C. § 2 and 21 U.S.C. § 952(a). The latter is a substantive charge of importing a controlled substance into the United States; the former is an aiding and abetting charge. Delgado argues that because Mike and Dave flew the cocaine into the United States Naval Base at Guantanamo Bay, Cuba, where the DEA agents took over and brought it into the United States, the statutory requirement of importing "into the United States from any place outside thereof,"

21 U.S.C. § 952(a), has not been met and cannot premise an aiding and abetting conviction.

We disagree. This Circuit long ago settled the question whether a government assisted or accomplished importation is an innocent act that prevents a defendant from being guilty of the crime as an aider and abetter. We held it is not an innocent act, and the defendant may be found guilty as an aider and abetter. *Haynes v. United States*, 319 F.2d 620 (5th Cir.1963); *accord United States v. Meinster*, 619 F.2d 1041 (4th Cir.1980); *United States v. Gould*, 419 F.2d 825 (9th Cir.1969). *United States v. Mercer*, 18 M.J. 644 (1984), illustrates the reasoning. The Court in *Mercer* distinguished two situations: The first, when the defendant uses a government agent to transport an illegal substance in which the defendant has a proprietary interest and second, when the defendant merely assists a government agent in transporting an illegal substance in which the defendant has no proprietary interest. In the first situation, the defendant is guilty as an aider and abetter; in the second, he is not.

In the instant case, Delgado had a proprietary interest in the cocaine as evidenced by his retaking possession at the DEA controlled delivery. We find the evidence was sufficient to convict Delgado under 18 U.S.C. § 2 and 21 U.S.C. § 952(a). We affirm.

ii. Hernandez

Hernandez argues the evidence cannot support his convictions under 21 U.S.C. § 846, 21 U.S.C. § 841(a)(1), and 18 U.S.C. § 2. We disagree.

To convict Hernandez of conspiracy to possess with intent to distribute, under 21 U.S.C. § 846, the government had to prove beyond a reasonable doubt that (1) an agreement existed between two or more persons to commit a crime and (2) the defendant knowingly and voluntarily joined or participated in the conspiracy. *United States v. Andrews*, 953 F.2d 1312, 1318 (11th Cir.), *cert. denied*, ___ U.S. ___, 112 S.Ct. 3007, 120 L.Ed.2d 882 (1992); *United States v. Vera*, 701 F.2d 1349 (11th Cir.1983). To prove an agreement existed the government may use

> circumstantial evidence, such as inferences from the conduct of the alleged participants or from circumstantial evidence of a scheme. Proof is not required that the defendant had knowledge of all the details of the conspiracy; the defendant need only have knowledge of the essential objective of the conspiracy. The defendant may be found guilty of conspiracy even if he did not join the conspiracy until after its inception, and even if he plays only a minor role in the total scheme.

United States v. Tamargo, 672 F.2d 887, 889 (11th Cir.) (internal citations omitted), *cert. denied*, 459 U.S. 864, 103 S.Ct. 141, 74 L.Ed.2d 119 (1982); *see also United States v. Gianni*, 678 F.2d 956, 959 (11th Cir.) (specifying that a defendant's assent may be inferred from acts furthering the conspiracy's purpose), *cert. denied*, 459 U.S. 1071, 103 S.Ct. 491, 74 L.Ed.2d 633 (1982).

After careful review, we hold the evidence supports Hernandez's convictions. Two witnesses, Goyanes and Costa, testified to Hernandez's involvement in the conspiracy. According to Goyanes, Hernandez attended at least five meetings to plan and prepare the importation

(R. 9:581-82); Hernandez was present on Riverol's farm when the conspirators contacted Colombia by radio (R. 9:586); Hernandez gave Goyanes $1000 upfront for pilot expenses (R. 9:582); Hernandez performed surveillance and security at the DEA controlled delivery (R. 9:610); and Hernandez attended and participated in a meeting to recover the cocaine once the conspirators realized it was missing (because the DEA had intercepted the van) (R. 6:616-21). According to Costa, at this meeting Hernandez threatened that if the cocaine was not found someone could get killed. (R. 12:1299-1303).

Hernandez argues Goyanes and Costa lack credibility because they are government cooperating witnesses, or "flippers." Nonetheless, the jury decides whether a witness is credible; we "will not overturn a jury's decision to believe a witness." *Andrews*, 953 F.2d at 1318.

The same evidence supports a conviction, directly or under an aiding and abetting theory, 18 U.S.C. § 2, for possession with intent to distribute cocaine in violation of 21 U.S.C. § 841(a)(1). A showing that the defendant "associated himself with a criminal venture, participated in it as something he wished to bring about, and sought by his actions to make it succeed" will support a conviction for aiding and abetting. *United States v. Bryant*, 671 F.2d 450, 454 (11th Cir.1982). Hernandez's actions calculated to ensure success of the substantive crime, even though they took place after the thwarted delivery, support a conviction for aiding and abetting. *United States v. Perez*, 922 F.2d 782, 786 (11th Cir.), *cert. denied*, 501 U.S. 1223, 111 S.Ct. 2840, 115 L.Ed.2d 1009 (1991). A reasonable jury could have found that Hernandez associated himself with the conspiracy, and "that by conducting surveillance and

actively seeking the lost cocaine, [he] intended to bring about the successful completion" of the crime. *Id.*

Viewing the evidence in the light most favorable to the government, including all reasonable inferences and credibility judgments, *see Glasser v. United States*, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942), we conclude a reasonable trier of fact could have found the defendant guilty beyond a reasonable doubt. *United States v. Kelly*, 888 F.2d 732, 740 (11th Cir.1989). We affirm Hernandez's convictions as to each count.

D. Prosecutorial Misconduct

i. Improper Vouching

Riverol and Delgado argue the trial judge erred in permitting the government to introduce portions of plea agreements between the government and its cooperating witnesses. The portions challenged contained promises to testify truthfully. Because these agreements were introduced on direct examination, before any cross-examination attack on the witness's credibility, the defense argues the government improperly attempted to bolster or vouch for the credibility of its witnesses. The defense relies on *United States v. Hilton*, 772 F.2d 783, 787 (11th Cir.1985), for this rule of law. This Court, however, modified *Hilton* the following year in *United States v. Cruz*, 805 F.2d 1464 (11th Cir.1986). Under *Cruz*, if defense counsel attacks a witness's credibility during opening the prosecutor may rehabilitate the witness on direct examination. Specifically, a prosecutor may "elicit testimony regarding the truth-telling portion of a cooperation agreement during direct examination." *Id.* at 1480.

In the instant case, the record discloses abundant vitriolic remarks during defense counsels's openings on the character and credibility of government witnesses, the least of which included calling them liars, perjurers, and paid prevaricators. (*See* R. 6:278-305). Accordingly, we conclude the trial judge did not err when he permitted the prosecutor to delve into the plea agreements on direct examination.

ii. Improper Comment in Closing Argument

a. Defendants's Failure to Explain Presence at a Shopping Center

Delgado and Hernandez request a new trial based on the following prosecutorial comment in closing argument:

> And what is the legitimate reason? I mean, did you hear a legitimate reason for any of those four individuals to be at the Palmetto Park Square shopping center?

(R. 13:1736). Defense counsel immediately objected, were sustained, and the Court gave the following curative instruction:

> Counsel are quite correct, there is no burden on the defendants to produce any evidence at all or to produce any. They don't have to testify, they don't have to produce any evidence. You must not infer in any way that they do.

(R. 13:1736). Immediately after the judge's curative instruction the prosecutor continued his closing argument with the following:

> That is absolutely true. The government has the burden in this case. The government has the burden of proof in this case to prove to you what the defendants were doing at the Boca Raton shopping center. What they were doing was aiding and abetting the delivery of 600 kilograms of cocaine.
>
> And when I talk to you about what they – legitimate reasons, I am talking about through the arguments of counsel, what counsel has stated in terms of what they're doing there.

(R. 13:1737).

Appellants argue the remarks were an improper comment on the assertion of their Fifth Amendment right not to testify, and an improper burden shifting suggestion to the jury that the defendants bore a burden to produce exculpatory evidence. As to each contention, we disagree. Prosecutorial misconduct requires a new trial only if we find the remarks (1) were improper and (2) prejudiced the defendants's substantive rights. *United States v. Cole*, 755 F.2d 748, 767 (11th Cir.1985). To judge whether each prong is met we look to *United States v. Norton*, 867 F.2d 1354 (11th Cir.1989), in which this Court found that a prosecutor's indirect reference to a defendant's failure to testify is not reversible error per se. *Id.* at 1364.

When such a reference occurs, the district judge must determine whether the statement was (1) manifestly intended or (2) of such a character that a jury would naturally and necessarily take it to be a comment on the accused's failure to testify. *United States v. Herring*, 955 F.2d 703, 709 (11th Cir.1992). The district judge is better able to determine this because she has the opportunity to

observe the prosecutor's demeanor first hand. *Id.* We review the district judge's determination of prosecutorial intent or jury effect for abuse of discretion. *Id.*

In the instant case the district judge sustained the objection, gave a curative instruction, and denied the defense motions for a mistrial. The judge's actions unerringly accord with *Norton,* another case in which the "prosecutor did not directly refer to the *defendant's* decision not to testify, but to *defense counsel's* failure to rebut the government's evidence." *Norton,* 867 F.2d at 1364. *Norton* stressed the settled Eleventh Circuit law that "a defendant's fifth amendment privilege is not infringed by a comment on the failure of the defense, *as opposed to the defendant,* to counter or explain the testimony presented or evidence introduced." *Id.* (emphasis added). Such a statement is not one that the jury would "naturally and necessarily" construe to be a comment on the defendants's silence; it is closer to a permissible comment on the logical inferences from all the evidence than to an argument requiring negative inference from the defendant's failure to testify. *See id.* The statement, therefore, is neither improper nor prejudicial.

Even if the prosecutor's remarks were prejudicial, the district judge gave a curative instruction which, under settled Eleventh Circuit law, would render any error harmless where the evidence of guilt was overwhelming. *United States v. Herring,* 955 F.2d 703, 710 (11th Cir.1992); *United States v. Lopez,* 898 F.2d 1505, 1511 (11th Cir.1990); *United States v. Rodriguez,* 765 F.2d 1546, 1560 (11th Cir.1985); *United States v. Trujillo,* 714 F.2d 102, 104-05 (11th Cir.1983); *United States v. Dorr,* 636 F.2d 117, 121 (5th

Cir. Unit A. 1981). The jury convicted Delgado and Hernandez on all counts while acquitting Riverol on three of the four counts charged against him. The prosecutorial statement attacked by Delgado and Hernandez applied to Riverol as well. Their convictions, in the face of a three-count acquittal of Riverol, provide strong support that these remarks were harmless, if error.

Accordingly, when reviewed in context, assessing the probable jury impact, *see Cannon*, 41 F.3d 1462, 1469 (11th Cir.1995), we find no prejudice to either defendant's substantive rights. *See id.* The district court properly denied the defendants's motions for a mistrial.

The same analysis applies to the burden shifting argument. Even if improper, "the prejudice from the comments of a prosecutor which may result in a shifting of the burden of proof can be cured by a court's instruction regarding the burden of proof." *United States v. Simon*, 964 F.2d 1082, 1087 (11th Cir.1992). The district judge immediately and explicitly instructed the jury that the defense bore absolutely no burden to produce evidence. In light of this curative instruction, we again find the district court properly denied the defendants's motion for a mistrial.

b. "War on Drugs"

Riverol and Delgado request a new trial based on the following comment by the prosecutor in closing argument:

> [W]hether you're offended or not by paying Dave Cavanaugh $218,000 over two years for what he did, you shouldn't hold that against

> Dave Cavanaugh. That doesn't do anything to Dave Cavanaugh's credibility. The United States of America, your government, the DEA, paid Dave Cavanaugh those amounts. They paid Dave Cavanaugh those amounts in their "War on Drugs." If you have a problem with Dave Cavanaugh receiving that kind of money, your problem is with the government, it is not with Dave Cavanaugh and it shouldn't reflect on the credibility of Dave Cavanaugh as he testified in this courtroom.

(R. 13:1549).

Defense counsel objected immediately to the prosecutor's reference to the War on Drugs. The district judge overruled the objection and instructed the jury that they were to try only the issues in the case, not the War on Drugs. *Id.*

The defendants's argument lacks merit. This Court has held that "[r]eference during closing argument to the drug problems of society and defendants' roles in such problems are not unduly prejudicial or excessively inflammatory." *United States v. Zielie*, 734 F.2d 1447, 1461 (11th Cir.1984); *United States v. Metz*, 608 F.2d 147, 158 (5th Cir.1979).

Finding no merit to any of the defendants's prosecutorial misconduct allegations, we deny their requests for a new trial.

E. Jury Request for Testimony Transcripts to be Read Back

Hernandez argues the district court abused its discretion in denying the jury's request to read back portions of

the transcripts – which would have shown Hernandez was absent from a meeting where the final cocaine pick-up was planned – and in instructing the jury to rely upon its own collective recollection. We disagree.

During deliberations, the jury posed the following question:

> Your Honor: We would like to know if we have access to the transcripts to verify certain testimony; if not, can we verify who was identified by the witnesses as being present at the evening of May 19th, 1989, at [a certain restaurant]?

(R. 14:1784). If read back, the testimony would have shown Hernandez and the fifth defendant were not at the meeting, Albelo and Riverol were at the meeting, and Delgado came to the restaurant parking lot but never entered the restaurant.

The district court invited counsel to suggest a response to the jury's query. *Id.* Initially, counsel for the government, Albelo, and Riverol suggested instructing the jury to rely on their own collective memories. Counsel for Hernandez, Delgado, and the fifth defendant wanted the testimony read back. (R. 12:1784-85). Because the lawyers could not agree on whether the testimony should be read back, the judge urged them to stipulate to a list of who was present at the meeting in question. Eventually, the government, Hernandez, and the fifth defendant were willing to stipulate; Delgado, Albelo, and Riverol refused. (R. 12:1794-1800). In addition, Delgado, Albelo, and Riverol opposed any stipulation as to who was absent from the meeting because it would necessarily imply the remaining defendants were present. *Id.* Finally, after much

discussion between the lawyers and the court, the judge instructed the jury to rely on its collective memory. *Id.*

The district judge has broad discretion when responding to a jury request that evidence be reread. *United States v. Alfonso*, 552 F.2d 605, 619 (5th Cir.1977). Here, he was faced with two defendants who might benefit from the rereading or a stipulation, and three defendants who, according to their lawyers's own arguments, probably would be harmed by any rereading or stipulation. The judge did his best to reconcile their positions and craft a compromise to no avail. "This is one of those cases where the trial court, having given the matter proper consideration, could have been right on either course of action." *United States v. Quesada-Rosadal*, 685 F.2d 1281, 1283 (11th Cir.1982) (finding no abuse of discretion in refusing to read back testimony and instead instructing the jury to rely on their own recollection). Accordingly, we find the district court did not abuse its discretion in this matter.

F. Sentencing

The government concedes this Court must remand for the district court to resentence Hernandez and Albelo: Hernandez lacked notice his sentence would be adjusted for obstruction of justice; Albelo lacked notice his sentence might be adjusted for a firearm enhancement.[4] The

---

[4] As explained below, Albelo argues the district court erred in not stating reasons for the sentence imposed; accordingly, we do not know if the judge actually relied on the firearms enhancement. This issue is dealt with in full at III.F.iii.

government contests all other sentencing issues raised by appellants.

Upon review of the sentencing court's fact findings, we find no clear error.

i. Delgado

Delgado challenges as error the sentencing court's use of contested factual allegations regarding Delgado's role in the conspiracy. Delgado argues the evidence presented at trial did not support a finding that Delgado was either a leader or an organizer. We disagree.

A sentencing court may rely on disputed facts in a sentencing report when they are shown by some reliable proof allowing the court to conclude it is not unlikely the statements are true. *United States v. Restrepo*, 832 F.2d 146, 148 (11th Cir.1987). Specifically, the court may consider conduct proved by the greater weight of the evidence. *United States v. Alston*, 895 F.2d 1362, 1373 (11th Cir.1990). In imposing the upward adjustment the court cited two factors: Delgado received the lion's share of the cocaine and, when the conspirators had the opportunity to retake the cocaine, no decision could be made until Delgado arrived. Each factor is properly considered under the United States Sentencing Commission Guidelines, § 3B1.1 Application Note 4.[5]

---

[5] U.S.S.G. § 3B1.1 Application Note 4 allows a sentencing court to consider "the claimed right to a larger share of the fruits of the crime" and "the degree of control and authority exercised over others" in distinguishing leadership and organizational roles from those of mere management or supervision.

After careful review of the record we find the evidence amply supports these fact findings by the greater weight of the evidence. Accordingly, we find the sentencing court did not err in imposing the upward adjustment challenged by Delgado.

In addition, Delgado argues that including suppressed evidence in the presentence investigation ("PSI") report violated his constitutional rights. At trial, the district judge suppressed statements obtained in violation of both the Fifth and Sixth Amendments when Delgado was custodially interrogated after refusing to answer further questions without a lawyer.

The prosecution, citing *United States v. Lynch*, 934 F.2d 1226 (11th Cir.), *cert. denied*, 502 U.S. 1037, 112 S.Ct. 885, 116 L.Ed.2d 788 (1991), argues the sentencing judge may consider any reliable evidence, and that illegally seized evidence is reliable. Appellee's Br. at 60-61. While *Lynch* does so hold, it applies specifically to the exclusionary rule for Fourth Amendment violations. Indeed, *Lynch* points out that coerced confessions and convictions obtained without affording the defendant the benefit of counsel have questionable reliability that historically has kept sentencing judges from considering such evidence. *Id.* at 1235. We find the government's argument unpersuasive.

Delgado cites *Estelle v. Smith*, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981), for the rule of law that suppressed evidence cannot be used at sentencing. We easily distinguish *Estelle*, however, and find it inapposite to Delgado's argument. *Estelle* involved a capital defendant who submitted to a psychiatric evaluation without a

lawyer and without any knowing or voluntary waiver of his right to have a lawyer present, or to not incriminate himself. The prosecution called the examining psychiatrist at sentencing to testify that in his opinion Estelle was a future threat to society. This testimony was crucial because in Texas the sentencer must affirm that it considers the defendant a future threat to society before it may impose a death sentence. The *Estelle* Court found that use of the testimony violated Estelle's Fifth and Sixth Amendment rights. As *Estelle*'s progeny shows, however, this holding applies specifically to capital sentencings. *See Satterwhite v. Texas*, 486 U.S. 249, 257-58, 108 S.Ct. 1792, 1797-98, 100 L.Ed.2d 284 (1988). The reason for the distinction is clear: Most death penalty schemes use the jury as sentencer. *See* Deborah J. Gander, *Innocence of Death: A Habeas Petitioner's Last Chance*, 48 U. Miami L.Rev. 229, 230-231 nn. 2 & 8 (1993). When the trial judge acts as sentencer, the threat of improper prejudice, taint, or consideration is less grave. Accordingly, we refuse to extend *Estelle*'s reasoning to the case at hand.

While we agree with *Lynch* that evidence obtained in violation of the Fifth and Sixth Amendments is inherently suspect, the transcripts show the judge did not rely on the suppressed evidence at sentencing. (1st S.R. 3:6). He specified two reasons for the upward departure, neither of which involved the suppressed evidence. We find no reversible error in the presence of suppressed evidence in the PSI report where, as here, the sentencing judge did not consider that evidence. *See also United States v. Jones*, 899 F.2d 1097, 1103 (11th Cir.) (explaining that where a sentencing court relies only on properly considered evidence, clear error is the standard of review), *cert. denied*,

498 U.S. 906, 111 S.Ct. 275, 112 L.Ed.2d 230 (1990), *overruled on other grounds by United States v. Morrill*, 984 F.2d 1136 (11th Cir.1993). We do not reach the legal issue presented had the sentencing judge relied on suppressed evidence.

ii. Hernandez

Hernandez challenges the sentencing court's guidelines enhancement for firearm use during drug trafficking. He argues the three-prong test set out in *United States v. Otero*, 890 F.2d 366 (11th Cir.1989) (per curiam), was not met. *Otero* identified three conditions that support a sentence enhancement for a coconspirator's firearm possession: (1) the possessor was charged as a coconspirator; (2) the coconspirator possessed a firearm in furtherance of the conspiracy; and (3) the defendant receiving the enhanced sentence was a member of the conspiracy at the time of the firearms possession. *Id.* at 367; *see also United States v. Nino*, 967 F.2d 1508, 1514 (11th Cir.1992) (clarifying that "nowhere in the *Otero* opinion is it said that enhancement is allowable only if the three conditions set out in the opinion are met"), *cert. denied*, ___ U.S. ___, 113 S.Ct. 1432, 122 L.Ed.2d 799 (1993).

In the instant case, evidence established Delgado had a gun in his waistband at the final meeting of conspirators and agents found Hernandez's gun in Delgado's glove compartment. Delgado possessed the gun in furtherance of the conspiracy; Delgado and Hernandez were coconspirators; Hernandez's argument lacks merit. We find the firearms enhancement supported by the considerations set out in *Otero*. Further, Hernandez's contention

that *Otero*'s second prong is unmet because neither Delgado nor Hernandez was charged with using and carrying a firearm in relation to a drug trafficking offense also lacks merit. As *Nino* makes clear, a coconspirator need not be found guilty of a firearms charge; rather, a sentencing court need only make a factual finding for sentencing purposes that a coconspirator possessed a firearm in furtherance of the conspiracy while the defendant was a member of that conspiracy. *Nino*, 967 F.2d at 1514-15. We find no error in the sentencing court's firearms enhancement against Hernandez.

iii. Albelo

Albelo argues the sentencing court erred in failing to explicitly state the reasons for enhancement under the Guidelines pursuant to 18 U.S.C. § 3553(c)(2). The government argues this Court need not consider this issue because it has conceded Albelo's case must be remanded for lack of notice of the firearms enhancement. We agree and instruct the district court on remand to state the specific reason for any Guidelines departure. 18 U.S.C. § 3553(c)(2).

Albelo further contends the sentencing court erred in enhancing his sentence three levels for his role as a manager or supervisor under U.S.S.G. § 3B1.1(b). We disagree. The trial record and sentencing transcripts reveal a surfeit of evidence supporting the sentencing court's finding that Albelo managed or supervised. We find no clear error in the upward adjustment.

IV. CONCLUSION

We hold that the district court (1) did not abuse its discretion in ruling on evidence; (2) did not clearly err in its fact findings, although the sentence enhancements against Hernandez and Albelo were improper because of lack of notice; (3) properly applied the law; and (4) properly denied the defense motions for a mistrial. We VACATE the sentences of Hernandez and Albelo and REMAND for the district court to resentence in light of this opinion. The judgment of the district court as to all other issues is Affirmed.

AFFIRMED in part; VACATED in part and REMANDED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 92-4141

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JAUN A. DELGADO, EMILIO ALBELO, JUAN CARLOS RIVEROL, THOMAS RAUL HERNANDEZ,

Defendant-Appellants.

On Appeal from the United States District Court
for the Southern District of Florida

(Filed August 30, 1995)

BEFORE: COX, BLACK, Circuit Judges, and FAY, Senior Circuit Judge.

PER CURIAM:

The petition for rehearing filed by Appellants, JUAN A. DELGADO and JUAN CARLOS RIVEROL, is denied.

ENTERED FOR THE COURT:

/s/ Emmett R. Cox
UNITED STATES CIRCUIT JUDGE